CONCRETE ENGINEERING PRODUCTS BHD

v.

MERCES BUILDERS SDN BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: MT1-22-876-2001]
24 MARCH 2004

CIVIL PROCEDURE: *Solicitor - Change of solicitors - Failure to file notice of change of solicitors - Non-compliance of O. 64 r. 1 Rules of the High Court 1980 - Whether a mere irregularity - Whether strict compliance necessary - Whether stay order set aside*

CIVIL PROCEDURE: *Judgments and orders - Stay of execution - Setting aside - Failure to file notice of change of solicitors - Non-compliance of O. 64 r. 1 Rules of the High Court 1980 - Whether a mere irregularity - Whether strict compliance necessary - Whether stay order set aside*

This was the plaintiff's application to set aside a stay of execution ('the stay order') of a summary judgment on the premise that the defendants did not file a notice of change of solicitors in court when they had applied for the stay. The stay application had been filed by the law firm Messrs Arthur Wang, Lian & Associates and not the law firm of Messrs Yacob Mat Yim & Rakan-Rakan who had been representing the defendants all the while. The plaintiff alleged that since no notice of change of solicitors was filed, Messrs Arthur Wang, Lian & Associates had no *locus standi* to appear on behalf of the defendants.

Held (allowing the application):

[1] Order 64 r. 1 of the Rules of the High Court 1980 ('RHC') clearly states that unless and until a notice of change of solicitor is filed and served in accordance with this rule, the former solicitor shall be considered the solicitor of the party until the final conclusion of the cause or matter. Not only must the notice (to be filed only at the Registry) acquiesce to certain statutory specifications but also must be served on every other party to the cause or matter including the former solicitor. Anything less fails the test. (p 536 d-g)

[2] The fact that Messrs Arthur Wang, Lian & Associates had filed and served the notice of change of solicitors on the same date of the stay application though seven hours late, merely showed that even the latter recognised the relevancy of O. 64 r. 1(1) RHC. On that premise, its submission that the filing and successful service of the stay application sufficed to clothe it with the necessary authority, not only militates against the prevailing statutory requirements but also its own actions and initial beliefs. (p 536 g-h)

[3] Based on the available evidence at the date of the stay application, factually and legally the solicitors' firm that had the authority to represent the defendants was Messrs Yacob Mat Yim & Rakan-Rakan and not Messrs Arthur Wang, Lian & Associates. The latter was thus a stranger to the action. (p 537 g)

[4] There was no provision promulgated by Parliament in any statute or law established by common law permitting a relationship of a co-solicitorship with Messrs Yacob Mat Yim & Rakan-Rakan whereby there arose no requirement to file in any documents into court to establish that relationship. (p 538 a-b)

[5] The non-filing and service of a notice of change of solicitors was not a mere irregularity that could be construed as a technical non-compliance of the Rules. Any non-adherence to O. 64 r. 1 RHC would have occasioned a substantial miscarriage of justice. Order 64 r. 1 is absolutely unambiguous where the relevant party must carry out certain statutory acts whenever a need arises to change his solicitor. (pp 539 d-e & 540 a)

Case(s) referred to:

Getz Brothers & Co GMBH v. Pan-Malaysian Wood Products Sdn Bhd [1980] 2 MLJ 79 ***(refd)***

Government of State of Pahang v. Tengku Abdul Aziz & Anor [1978] 2 MLJ 34 ***(refd)***

Jutamark Sendirian Berhad v. Ironwood Shipyard Sdn Bhd [2001] 1 LNS 113 ***(refd)***

Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd [2003] 6 MLJ 311 HC ***(refd)***

Sathivel Alagarsamy v. Lakshmi Vellasamy [1998] 3 CLJ Supp 343 HC ***(refd)***

SPM Ramanathan Chettiar v. MPLM Muthu Chettiar & Ors [1940] 1 LNS 97 ***(refd)***

Supreme Finance (M) Bhd v. Wing Hong How [1999] 2 CLJ 1057 CA ***(refd)***

Quah Sin Kheng v. Mount Erskine Poutry Farm [1963] 29 MLJ 111 ***(refd)***

Yu Oi Yong & Anor v. Ho Toong Peng [1977] 1 MLJ 12 ***(foll)***

Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 2) [1997] 4 CLJ 209 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 64 r. 1(1)

For the plaintiff - Moses Susayan; M/s Moses Susayan & Assoc
For the defendants - Arthur Wang Ming Way (MC Tan); M/s Arthur Wang, Lian & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:
On 16 April 2002 the plaintiff, represented by Tetuan Ravi Beltran & Co had filed a summons in chambers against the defendants, pursuant to O. 14 of the Rules of the High Court 1980. Subsequently there was a change of solicitors whereby Tetuan Moses Susayan & Associates took over from Tetuan Ravi Beltran & Co. Tetuan Yacob Mat Yim & Rakan-Rakan then had represented the defendants. The summons was heard eventually and 'an order in terms' was obtained on 6 November 2002. On 11 November 2002 a notice of appeal to the judge-in-chambers, was filed in court by the defendants, the latter still represented by Tetuan Yacob Mat Yim. On 10 October 2003 at about 3.06pm the defendants had filed encls. 13 and 11, respectively a summons-in-chambers to stay the execution of the order founded on the abovementioned summary judgment, and a certificate of urgency. Tetuan Arthur Wang, Lian & Associates had filed those enclosures for the defendants (and not Tetuan Yacob Mat Yim). Apart from the above documents, the defendants had filed no other in the like of a notice of change of solicitors.

On 27 October 2003 encl. 13 was heard, and without suspecting anything was amiss, the court had granted the stay. On that date, Mr. Arthur Wang Ming Way of Tetuan Arthur Wang, Lian & Associates had represented the defendants, whilst the plaintiff, or its counsel, was not present. Sixteen days later ie, on 13 November 2003 the plaintiff's solicitor, still represented by Tetuan Moses Susayan & Associates had filed encl. 19, an application to set aside the stay order of 27 October 2003. The main complaints of the plaintiff were that:

i. Tetuan Arthur Wang, Lian & Associates, had no *locus standi* to appear on behalf of the defendants;

ii. payments had already been made (thus the substratum of the case having terminated) pursuant to a global settlement;

iii. and a notice of discontinuance of a winding up action against the defendants had been filed on 21 October 2003.

Come the hearing date of encl. 19 ie, the application to set aside the stay order on 27 January 2004 the matter canvassed by both parties revolved primarily on the issue of locus, that was whether Tetuan Arthur Wang, Lian & Associates could represent the defendants at the stay application stage. The plaintiff had come out strongly by stating that as far as it was concerned Tetuan Yaacob Mat Yim, based on the available records, were still the solicitors for the defendants. Furthermore, it never was informed of any change of solicitors, despite encls. 13 and 11 having been filed by Tetuan Arthur Wang, Lian & Associates, what with all communications prior to the application of stay, were made only through Tetuan Yaacob Mat Yim. The factor of the defendants changing its solicitor, which was not apparent from the records on the very morning of the stay application day by Tetuan Arthur Wang, Lian & Associates, became a reality only when a notice of change of solicitors was filed on the same day at about 3.16pm, and serving it at about 4.10pm, which was about seven hours later.

To overcome the dearth of documentation, endorsing its right of representation, Tetuan Arthur Wang, Lian & Associates had ventilated some novel arguments, *viz*.:

i. the filing of the summons-in-chambers praying for a stay order, which was served on the plaintiff, had supplied them the authority to represent the defendants. In a gist this act and application document had doubled up as a notice of change of solicitors, and

ii. alternatively there was a co-solicitorship relationship prevailing, hence dispensing the necessity of filing a notice of change of solicitors.

Having appreciated the arguments of Tetuan Arthur Wang, Lian & Associates I had no hesitation in rejecting the reasons, and I now supply the brief reasons.

The legal profession in Malaysia is regulated by the Legal Profession Act 1976 and the Legal Profession (Amendment) Act 1992 (Act A812), and a number of rules, inclusive of the Rules of the High Court 1980. Below are some of the rules that the legal fraternity are expected to be familiar with, in addition to the Legal Profession (Practice and Etiquette Rules) 1978 and the Legal Profession (Practice and Etiquette)(Amendment) Rules 1994, and they are, amongst others:

i. Advocates and Solicitors (issue of Sijil Annual) Rules 1978-P.U. (A) 368/ 1978;

ii. Advocates and Solicitor's Compensation Fund Rules 1978-P.U. (A) 370/ 1978;

iii. PU (A) 314/87 (Amendments to the 1978 Rules);

iv. Solicitor's Account Rules 1990-P.U (A) 301/1990;

v. Accountant's Report Rules, 1990-P.U. (A) 302/1990;

vi. Solicitors' Accounts (Deposit Interest) Rules 1990-P.U. (A) 303/1990;

vii. Solicitors' Remuneration Order 1991-P.U. (A) 475/1991;

viii. Legal Profession (Professional Liability)(Insurance) Rules 1992-P.U. (A) 237/1992;

ix. Solicitors' Remuneration (Amendment) Order 1994-P.U. (A) 80/1994;

x. Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994-P.U. (A) 189/1994;

xi. Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994-P.U (A) 190/1994;

xii. Legal Profession (Disciplinary Board) (Procedure) Rules 1994-P.U. (A) 191/1994;

xiii. Legal Profession (Discipline Fund) Rules 1994-P.U. (A) 249/1994;

xiv. Advocates and Solicitors (Issue of Sijil Annual) (Amendment) Rules 1995-P.U. (A) 239/95;

xv. Legal Profession (Professional Liability) (Insurance) (Amendment) Rules 1999;

xvi. Advocates and Solicitors (Issue of Sijil Annual) (Amendment) Rules 1999;

xvii. Advocates and Solicitors (Issue of Sijil Annual) (Amendment) Rules 2000;

xviii. Solicitors' Accounts (Deposit Interest) (Amendment) Rules 2000;

and

xix. Legal Profession (Publicity) Rules 2001.

For purposes of the current case, O. 64 r. 1(1) of the Rules of the High Court 1980 is highly pertinent, as it clearly sets out the necessary actions of a party that wishes to change its solicitor. This provision reads:

(1) A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, unless and until notice of the change is filed and served in accordance with this rule, the former solicitor shall, subject to rules 4 and 5 be considered the solicitor of the party until the final conclusion of the cause or matter, in the High Court.

(2) Notice of a change of solicitor in Form 138 must be filed in the Registry.

(3) The party giving the notice must serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former solicitor a copy of the notice.

(4) The party giving the notice may perform the duties prescribed by this rule in person or by his new solicitor.

This demanding statutory requirement, as reflected by the phrase "unless and until notice of the change is filed and served ...", is not merely restricted to a situation where a party wishes to change its solicitor, perhaps having been dissatisfied with the latter's performance, but extends to other scenarios. This statutory demand is equally applicable to a situation where a party having sued or had defended in person initially, but desires to appoint a solicitor to act in a cause or matter on his behalf subsequently, or where a person had initially sued or had been defended by a solicitor, intends now to act in person, after the necessary modification, is statutorily required to submit a notice of appointment of a solicitor in form 138 or submit a notice of intention to act in person in Form 139 respectively, similar to a notice of change of solicitor (r. 2). With r. 1(1) of O. 64 being so crystal clear, where unless and until a notice of change of solicitor has been filed, whereby the former solicitor shall subject to rr. 4 and 5, still be considered the solicitor of the party until the conclusion of the cause or matter, the argument of Tetuan Arthur Wang, Lian & Associates therefore was untenable. In a scenario of a change of solicitor not only must the notice (to be filed only at the registry) acquiesce to certain statutory specifications, but must also be served on every other party to the cause or matter including the former solicitor. Anything less fails the test.

The fact that Tetuan Arthur Wang, Lian & Associates had filed and served the notice of change of solicitors on the same date of the stay application, though seven hours late, merely showed that even the latter recognized the relevancy of O. 64 r. 1(1). On that premise, its submission that the filing and successful service of the stay application sufficed to clothe it with the necessary authority, not only militates against the prevailing statutory requirements, but also its own actions and initial beliefs. In *Sathivel Alagarsamy v. Lakshmi Vellasamy* [1998] 3 CLJ Supp 343 the court there had opined:

> It has been reiterated time and again that rules of procedure must be obeyed. Order 64 RHC to me is clear and unambiguous. A counsel has locus standi to appear on behalf of their clients only upon filing the requisite notice. It is trite law that upon service of any court process a litigant can elect either to conduct a case entirely in person or to entrust the case entirely to her counsel. The rules prescribe the requisite notice that must be filed to give counsel the necessary standing. It is only upon the filing of that requisite notice that counsel has an implied authority to appear on their client's behalf, to enter into a compromise, subject of course to any express limitation imposed on that authority by the client.

In *SPM Ramanathan Chettiar v. MPLM Muthu Chettiar & Ors* [1940] 1 LNS 97 at p. 3, despite the defendant having directed its solicitor to stop representing him, the failure to serve the 'notice of change of solicitor' caused the court to conclude that no change of solicitor had taken place. The court there had remarked:

> I hold that unless a change of solicitor had been effected in accordance with the provision of O. 7 r. 3 Mr Salt continued to represent the first defendant and that the mere writing of the letter of 16 February 1938, set out above was of no legal effect, so far as the court was concerned, in the absence of the filing in Court of the notice under O. 7 r. 3(3) or O. 7 r. 3(4). Order 7 r. 3(3) reads:
>
> > Unless such notice is filed, and a copy served on the opposite party, the former solicitor shall be deemed to be the solicitor of the party, and his address for service, until the final conclusion of the cause or matter, whether in the Court of first instance or on appeal.

In *Jutamark Sendirian Berhad v. Ironwood Shipyard Sdn. Bhd* [2001] 1 LNS 113 the court had stated:

> The rationale behind the filing of the notice of change or appointment of solicitor is to identify the counsel on record and their address of service. The filing of the notice is important to avoid any confusion as to who actually is acting for a party. This is the spirit of O. 64 RHC.

Suffice for me at this stage to state that based on the available evidence, at the date of the stay application, which was on 27 October 2003 factually and legally the solicitor's firm that had authority to represent the defendants was Tetuan Yacob Mat Yim & Rakan Rakan, and not Tetuan Arthur Wang Lian & Associates. The latter thus was a stranger to the action (*Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No. 2)* [1997] 4 CLJ 209; *Quah Sin Kheng v. Mount Erskine Poutry Farm* [1963] 29 MLJ 111; *Getz Brothers & Co. GMBH v. Pan-Malaysian Wood Products Sdn. Bhd.* [1980] 2 MLJ 79).

As regards the concept of co-solicitorship with Tetuan Yacob Mat Yim & Rakan Rakan, a rather novel idea at that, whereby there arose no requirement to file in any documents into court to establish that relationship, as submitted by Tetuan Arthur Wang Lian & Associates, was an argument that was without merit. Apart from there being no provision promulgated by Parliament in any statute, or law established by Common Law permitting such a relationship, I was also unable to find any record that could confirm it either. In fact the defendants in crystalline language had explicitly stated many a time of the improbability of the existence of such a relationship when affirming in the following manner in encls. 20 para. 5(f) and 5(g) respectively:

1. On 26-9-2003 the defendants commenced discussions through Tetuan Yacob Mat Yim & Rakan-Rakan (hereinafter referred to *as the previous solicitor* ...); and

2. On 29-9-2003 the defendants had directed Tetuan Arthur Wang & Associates (hereinafter referred to *as the current solicitor* ...).

Apart from the above description of the defendants, an affidavit adduced in support of them affirmed by one Amir Asree bin Meor Nordin, a solicitor who had left Tetuan Yacob Mat Yim & Rakan-Rakan, had stated in no uncertain terms that "the defendants had indeed appointed a new solicitor to take over the matter ...".

In short, apart from the defendants themselves rejecting the notion of co-solicitorship when they had referred to Tetuan Yacob Mat Yim & Rakan-Rakan as the previous solicitor, with Tetuan Arthur Wang & Associates referred to as the current solicitor, all the other supposed corroborative evidence instead pointed to the abrogation of such a concept. There mere fact that Tetuan Arthur Wang & Associates had hurriedly filed the change of solicitors notice late in the day at about 3.16pm on 27 October 2003 and serving on the plaintiff at about 4.10, indicated that even they were aware of the legal necessity of filing the change of solicitors documents. Notwithstanding the above facts, I do not wish to conjecture why learned counsel for the defendants had propagated the co-solicitorship concept before me, especially when the improbability of the defendants' argument was too clear for comfort. On the totality of the evidence, I had no hesitation in rejecting the argument of the existence of co-solicitorship, based on the dearth of legal foundation or factual premise.

It is trite that the Rules of the High Court 1980 is a statute, and built in it are some rather specific provisions, which at first glance demands rather strict adherence to the prerequisites. Yet despite that observation, recent amendments to the Rules of the High Court 1980 as reflected by the Rules of the High Court (Amendment) 2002) (P.U. (A) 197/2002), by the insertion of O. 1A,

effective on 16 May 2002 which demands that, "In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non compliance of any rules herein" have watered down the strict compliance over procedural matters. In fact, under the amended O. 2 r. 3 Rules of the High Court 1980 *via* P.U. (A) 197/2002, "a court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice." After perusing the above amendments, and after having scrutinized the current unamended O. 2 r. 1, which provides that failure to comply with the rules would tantamount to an irregularity and not a nullity, the amendments merely accentuate the view that justice would not be served by acceding to objections on technicalities for non-compliance (*Government of State of Pahang v. Tengku Abdul Aziz & Anor* [1978] 2 MLJ 34).

Having sifted the facts of this case, the non-filing and serving of a notice of change of solicitors in the context of the facts of this case, was not a mere irregularity which could be construed as a technical non-compliance of the Rules, but something more serious than that. It is my view that any non-adherence of O. 64 r. 1 here would have occasioned a substantial miscarriage of justice, as it nearly did, had the plaintiff not brought the matter to my attention when ventilating his frustration (distinguishable to *Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311). It is also my view that the above amendments are not meant to deny each and every preliminary objection brought before the judge, but merely to consign to oblivion procedural matters, which do not prejudice anybody's rights. In a gist, if substantial injustice might be occasioned by non-compliance of the Rules, hence selective in effect, the court or judge is not prevented from listening to an appropriate preliminary objection. This view is in consonance too with the observation of Chang Ming Tat J in *Yu Oi Yong & Anor v. Ho Toong Peng* [1977] 1 MLJ 12, when his Lordship had said:

> There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules. It should I think be realized by practitioners as well as by judges that while strict and lavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.

In this case O. 64 r. 1 is absolutely unambiguous, where the relevant party must carry out certain statutory acts, whenever a need arises to change his solicitor. Once that is satisfactorily completed, any party interested with the matter or cause will be able to identify that new solicitor, and react accordingly beneficial to him, and in the process ensure that no unnecessary glitches detrimental to the proceedings will occur subsequently. Satisfactory adherence of this provision will surely act like a sieve, identifying both the previous and the new solicitor, and sidelining or separating anyone else without that distinctive authority, a stranger. The latter, possessing no legal standing and unrecognized by anyone, can never be accorded any *locus standi*, and any contribution unless waived must remain void. In support of the above views, it may be timely if I were to reproduce the remarks of NH Chan, JCA in *Supreme Finance (M) Berhad v. Wing Hong How* [1999] 2 CLJ 1057, which reads:

> Since personal service of the writ is required and the writ was not duly served on the respondent in the present case, what then is the effect of SK Tan & Co entering an appearance for the respondent? By not effecting personal service of the writ means that the writ was never served on the respondent at all. Unless service is exempted by the rules (which is not the case here) or dispensed with by an order of the court under Order 62 r. 1(2) (which is not the case here), service of the writ is required. The non-service of the writ could not be cured by the unconditional appearance entered by SK Tan & Co on behalf of the respondent, as they had not been duly authorized to act for him. SK Tan & Co.'s unauthorized appearance, when the writ was not served and service was not exempted, could not waive the necessity of service of the writ on the respondent. The fact of not serving the writ when it was required by the rules to be duly served (without it being waived by the respondent entering an unconditional appearance to it (Order 10 r. 1(3)) made the subsequent proceedings void. *The appearance was rendered void because SK Tan & Co were not duly authorized to act for the respondent and all subsequent proceedings, including the judgment under Order 14 (which was obtained under the void appearance), could be set aside.* However, a defendant ... could waive service ... (but this is not the case here ... (Order 1 r. 1 (3) (emphasis added).

At the conclusion of the case, I had unhesitatingly allowed the application in encl. 19 ie, the application to set aside the order of 27 October 2003 with costs. The consequential effect was that the defendants had agreed to withdraw encl. 13 (stay of execution application).